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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN CURRY,

Defendant and Appellant.

B263039

(Los Angeles County  
Super. Ct. No. BA172594)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Cheryl Lutz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

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Jonathan Curry, convicted in 1999 of possession of a firearm by a felon and sentenced to 25 years to life in state prison, petitioned for recall of his sentence pursuant to Penal Code<sup>1</sup> section 1170.126. The trial court denied the petition, finding Curry ineligible for relief because he was armed during the commission of the offense. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Early in the morning of August 8, 1998, two police officers heard a gunshot as they searched for a car burglary suspect, and they then encountered Curry in an alley. Curry's left hand was in his jacket making a tucking motion at his waist. When the police commanded him to stop, Curry began to flee on foot. During the ensuing pursuit, Curry reached into his jacket, pulled out a handgun, and threw it to the ground. Officers recovered the firearm.

Curry was convicted of possession of a firearm by a felon (§ 12021, subd. (a)).<sup>2</sup> The trial court sentenced him to a third strike sentence of 25 years to life in state prison. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) On appeal, this court affirmed the judgment. (*People v. Curry* (Feb. 2, 2000, B131014) [nonpub. opn.] )

In 2012, the electorate passed Proposition 36, the Three Strikes Reform Act of 2012, which, among other modifications of the Three Strikes law, added section 1170.126 to the Penal Code to permit petitions for recall of sentences and resentencing by individuals who would not have been subject to indeterminate life sentences had they been sentenced under Proposition 36.

On December 12, 2012, Curry petitioned the trial court to recall his sentence and resentence him. The trial court denied the petition on the ground that Curry had been armed with a firearm and was therefore ineligible for resentencing under Proposition 36. Curry appeals.

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The statute has since been renumbered as section 29800, subdivision (a).

## DISCUSSION

On appeal, Curry argues that former section 12021(a)(1) is not a crime enumerated in Proposition 36 as being excluded from eligibility for resentencing, and that, under the circumstances of his conviction, he should not have been deemed ineligible for resentencing.

As relevant here, an inmate is not eligible for resentencing under section 1170.126 if “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) Acknowledging this provision, Curry argues that these factors may not be part of the offense in question, but must be found in addition to another felony. He contends that the arming exclusion does not apply “when the arming is essentially an element of the offense.” As a result, he argues his conviction for the possession of a firearm does not fall within the exclusion, and that he is eligible for relief under section 1170.126.

The appellate courts have uniformly rejected this argument, a fact Curry acknowledges. Although he argues those cases were wrongly decided, we disagree.

In *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*), the court noted that the phrase “armed with a firearm” “has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively.” (*Id.* at p. 1029.) The court discussed the distinction between being armed and being in possession of a firearm: “A firearm can be under a person’s dominion and control without it being available for use. For example, suppose a parolee’s residence (in which only he lives) is searched and a firearm is found next to his bed. The parolee is in possession of the firearm, because it is under his dominion and control. If he is not home at the time, however, he is not armed with the firearm, because it is not readily available to him for offensive or defensive use. Accordingly, possessing a firearm does not necessarily constitute being armed with a firearm. [Footnote.]” (*Id.* at p. 1030.)

The evidence in the *Osuna* defendant's case established that he was "armed with a firearm" when he illegally possessed the firearm. (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) The defendant did not dispute this. He claimed, however, as does Curry, that in order to be ineligible for recall of sentence under Proposition 36 "there must be an underlying felony to which the firearm possession is 'tethered' or to which it has some 'facilitative nexus.'" He [argued] one cannot be armed with a firearm during the commission of possession of the same firearm." (*Ibid.*)

The court explained this analysis would be appropriate if the case "were concerned with imposition of an arming *enhancement*—an additional term of imprisonment added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. [Citations.]" (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) An arming enhancement under section 12022, subdivision (a)(1), may be imposed where the defendant is armed "'in the commission of' a felony." (*Osuna, supra*, 225 Cal.App.4th at p. 1031.) Such an enhancement "'requires *both* that the 'arming' take place during the underlying crime *and* that it have some 'facilitative nexus' to that offense.'" (*Ibid.*) That is, that the defendant "have a firearm 'available for use *to further the commission of the underlying felony*.'" [Citation.]" (*Ibid.*)

However, "[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon. Thus, a defendant convicted of violating [former] section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022, because there is no 'facilitative nexus' between the arming and the possession. However, unlike section 12022, which requires that a defendant be armed '*in the commission of*' a felony for additional punishment to be imposed (*italics added*), [Proposition 36] disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm '*during the commission of*' the current offense (*italics added*). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' (Webster's 3d New Internat. Dict. (1986) p. 703.) In other words, it requires a temporal nexus between the arming and the

underlying felony, not a facilitative one. The two are not the same. [Citation.]” (*Osuna, supra*, 225 Cal.App.4th at p. 1032.)

Based on this analysis, the court concluded the “defendant was armed with a firearm *during* his possession of the gun, but not ‘in the commission’ of his crime of possession [of a firearm by a felon]. There was no facilitative nexus; his having the firearm available for use did not further his illegal possession of it. There was, however, a temporal nexus. Since [Proposition 36] uses the phrase ‘[d]uring the commission of the current offense,’ and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, . . . the literal language of [Proposition 36] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.” (*Osuna, supra*, 225 Cal.App.4th at p. 1032; accord, *People v. Brimmer* (2014) 230 Cal.App.4th 782, 799 (*Brimmer*) and *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1363.)

Appellate courts in the firearm possession cases have uniformly concluded the ineligibility factor applies whenever the record shows the defendant was in actual physical possession of the firearm, and thus armed. (See *Brimmer, supra*, 230 Cal.App.4th at p. 797; *Osuna, supra*, 225 Cal.App.4th at p. 1030; *People v. White* (2014) 223 Cal.App.4th 512, 525; *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.) They reason that a firearm possession offense that amounts to arming is not a minor non-violent offense for purposes of Proposition 36. (See, e.g., *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1057 [“A felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available for use, simply does not pose little or no risk to the public”].)

Curry also argues that because section 1170.126 was drafted to exclude certain specified crimes from sentencing relief—those crimes listed as serious and/or violent felonies under sections 667.5, subdivision (c) and 1192.7—that list would have included felony possession of a firearm if it were intended to be a disqualifying crime. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391, fn. 13

[noting interpretive canon that “the expression of certain things in a statute necessarily involves exclusion of other things not expressed”], superseded by statute on another ground.) This argument, too, has been rejected: “But of course, the mere possession of the firearm, without arming, is not a disqualifying crime. And in this case, the trial court determined defendant did not merely ‘possess’ the firearm, he was armed with it. He was disqualified from relief based upon his arming, not his mere possession.” (*People v. White, supra*, 243 Cal.App.4th at p. 1364.)

Curry’s case is not distinguishable. As in *Osuna*, Curry had the weapon available for use; the record demonstrated the weapon was loaded and within his grasp when he was first sighted by the police. The trial court did not err.

### **DISPOSITION**

The order denying the petition is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

GARNETT, J. \*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.